COMMONWEALTH OF MASSACHUSETTS

DEPARTMENT OF TELECOMMUNICATIONS AND ENERGY

Investigation by the Department of Telecommunications and Energy on its own Motion into the Appropriate Pricing, based upon Total Element Long-Run Incremental Costs, for Unbundled Network Elements and Combinations of Unbundled Network Elements, and the Appropriate Avoided Cost Discount for Verizon New England, Inc. d/b/a Verizon Massachusetts' Resale Services in the Commonwealth of Massachusetts	D.T.E. 01-20

A PLEA TO PROTECT REASONED DECISIONMAKING BY PROTECTING THE ADJUDICATORY PROCESS: AT&T'S OPPOSITION TO VERIZON'S MOTION SEEKING THE WHOLESALE ADMISSION OF ALL DISCOVERY RESPONSES INTO EVIDENCE

Justice Robert J. Cordy of the Supreme Judicial Court recently observed that, "[w]hile the court can always resolve cases and controversies that come before it – at least in some manner – a good decision requires the proper framing of the issues, and the thoughtful compilation of a record." *Boston Bar Journal*, January/February 2002, at 8. The same is true of the Department.

The Ground Rules and procedural schedule in this case established a careful adjudicatory process designed to allow and indeed to require the parties to frame the issues and present a focused evidentiary record through the submission of prefiled testimony. To permit Verizon at the end of the case to dump into the record for the first time hundreds of discovery responses consisting of thousands upon thousands of pages of documents and voluminous electronic and paper data would not only unfairly prejudice the parties, but more importantly it would substantially hamper rather than enhance the Department's ability to engage in thoughtful consideration of the issues that it must resolve in order to set TELRIC-compliant UNE rates.

AT&T therefore respectfully urges the Department to reject the motion filed by Verizon on January 17, 2002, to admit all discovery responses into evidence, and to continue with a more focused adjudicatory process that will best permit the Department to do its difficult job well.[1]

Argument.

"[O]nly a fraction of written or documentary material made available in responses to discovery requests ever finds its way into the evidentiary record in a typical Department proceeding." D.T.E. 01-20, *Interlocutory Order* dated October 18, 2001, at 32 n.24. The reason can reasonably be reduced to the wise words of Justice Cordy. The Department does not hold adjudicatory hearings as an exercise to collect the greatest amount of information and data possible. To the contrary, the key virtue of an adjudicatory process is that interested parties help the Department by framing the issues, and by presenting and engaging each other on the evidence that each side believes to be most important. An adjudicatory process should not to be confused with an open-ended and unfocused process of compiling and transmitting data, during which parties dump any and all available evidence into the record, even without any foundation or demonstration of relevance, and even without providing any practical opportunity for other parties to respond to or engage with such a mountain of data.

Verizon's motion is in substance a request to revise the Ground Rules adopted for this proceeding. It is far too late in the process to do so now. If Verizon had wanted from the outset for the Department to treat all discovery responses as record evidence, it should have made that proposal early in the process. Instead, it waited to make its request until the middle of hearings and almost a full year after issuance of the Ground Rules and initial procedural schedule. To

[1] AT&T will file separately any specific objections it has to the admission of specific exhibits proferred by Verizon, as agreed to in off-the-record discussion with Verizon's counsel and the Hearing Officer. This Opposition is limited to the general request by Verizon to admit every single discovery response into evidence.

change the procedural framework for this proceeding at this late date would be inappropriate, and a bad idea to boot.

I. THE GROUND RULES AND PROCEDURAL SCHEDULE PERMIT PARTIES TO PRESENT AND DEVELOP THEIR CASE THROUGH PRE-FILED TESTIMONY AND CROSS-EXAMINATION, NOT BY DUMPING INFORMATION RESPONSES INTO THE RECORD BY MOTION.

From the very beginning of this proceeding, it has been clear that the response to an information request would not be treated as evidence unless it were either discussed in pre-filed testimony by a witness, or used by an opposing party or the Department in cross-examination.

The Ground Rules established that information requests and responses were to be treated as "prehearing discovery in the nature of interrogatories and requests for documents (Mass. R. Civ. P. 33, 34), and specified that "[r]esponses to information requests will not be part of the record unless marked and admitted into evidence." DTE 01-20, *Hearing Officer Memorandum Re: Procedural Conference and Procedural Schedule; Service List; and Ground Rules*, ¶ 2 (February 9, 2001) (the "Ground Rules"). In the Commonwealth's trial courts, interrogatory responses and documents produced in discovery do not become part of the evidentiary record in a case unless either: (i) the parties stipulate to their admission; or (ii) a competent witness explains the relevance of the evidence and lays a proper foundation for its admission. The Ground Rules made clear that information responses in this Docket would be treated like discovery responses in court, and would not in and of themselves be treated as evidence.

The Department simultaneously established a procedural schedule for this case. Although the specific dates in that schedule were subsequently revised, the basic structure of the proceeding was never altered. The procedural schedule provided parties the opportunity to develop their affirmative case through the filing of three rounds of prefiled testimony. The original direct testimony and cost models was filed in May 2001, the rebuttal testimony was filed in July 2001, and the surrebuttal testimony was filed on December 17, 2001. The procedural

schedule never contemplated or permitted parties to add to their affirmative case after pre-filed testimony, except in response to questions by the Department or other parties at the hearings that are now being completed.[2]

In its rulings on motions to compel in this case, the Department has reiterated the distinction between discovery (or responses to discovery requests) and evidence. The discovery process is an opportunity to obtain potentially relevant information, which the parties then must winnow to separate the meaningful grain that will be offered into evidence through the testimony of a witness from the distracting, incomplete, and irrelevant or marginally relevant chaff that should be allowed to blow away.

> Parties need access to relevant materials during discovery in order to assess the claims of other parties, to challenge the contentions of other parties' witnesses, and to make the most effective evidentiary record they can. In this way, the Department is able to come to a well-reasoned decision on an ample evidentiary record. Discovered materials are not themselves evidence of record until they are presented to the trier of fact and properly admitted. *The distinction between discovery and admission into the evidentiary record should not be blurred.*

DTE 01-20, *Interlocutory Order* dated October 18, 2001, at 32-33 (emphasis added, citation omitted).

In its prefiled testimony, Verizon showed repeatedly that it understood full well the proper manner to lay a foundation for admission of discovery responses through a witness. Verizon's witnesses discuss those discovery responses, by other parties or by Verizon itself, that they considered to be significant in this case. *See, e.g.*, Ex. Vz-28, Clark Surrebuttal, at 4, 28; Ex. Vz-38A, Verizon Recurring Cost Panel Surrebuttal – Proprietary, at 12-13 fn. 6-7, and 26-27

[2] Record requests are not an additional avenue for adding to a parties' evidentiary case, but rather "are written substitutes to oral answers where fault of memory or complexity of subject precludes a responsive answer by the witness in the hearing." *Ground Rules* ¶ 4. "Record requests shall not be used as a substitute for discovery or as a substitute for re-direct examination." *Id.* Similarly, information requests should not be used as a substitute for record requests - - the practical result of Verizon's proposed procedure that places into the record every response to an information request.

fn. 13 (discussing Verizon discovery responses). *See also, e.g.* Ex. Vz-18, Verizon's NRC Surrebuttal, at 34; Ex. Vz-38A, Verizon Recurring Cost Panel Surrebuttal – Proprietary, at 76, 99; Ex. Vz-28, Clark Surrebuttal, at 35; Tardiff Rebuttal, *passim*; Dippon Surrebuttal at 5-6, 14-15 (discussing discovery responses by other parties).

If Verizon believed that other discovery responses were also both relevant and significant, it should have explained why in its prefiled testimony. It is much too late for Verizon to do so now, just as it is much too late for other parties to respond for the first time to incomplete or misleading discovery responses that Verizon made no attempt to use as evidence until now.

Verizon notes that on other occasions, beginning with the 1996 *Consolidated Arbitrations* proceeding, a Department arbitrator or hearing officer has admitted into evidence all discovery responses. But in the *Consolidated Arbitrations* docket the parties agreed to such a procedure under the unique stresses of complying with a new law within a limited time frame. That agreement has on occasion – and we submit unfortunately – been an example followed in later proceedings. But it is an example inconsistent with the procedures established for this adjudicatory proceeding and inconsistent with the spirit, and perhaps even the letter, of the promulgated regulations under which Department proceedings are conducted.

The rules for the conduct of proceedings before the Department are codified under 220 CMR. 1.00 *et seq*. As noted by the Department in its October 18, 2001 *Interlocutory Order*, at 32-33, those rules distinguished between discovery material and evidentiary material. While discovery materials may include virtually any relevant material responsive to an information request, evidentiary material is subject to the requirements of 220 CMR §1.10(1), which states (emphasis added):

> Evidence. *The Department shall follow the rules of evidence observed by courts when practicable* and shall observe the rules of privilege recognized by law, except as otherwise provided by any other law. *There shall be excluded such evidence as is unduly repetitious or cumulative* or such evidence as is not of the kind on which reasonable persons are accustomed to rely in the conduct of serious affairs. All unsworn statements appearing in the record shall not be considered as evidence on which a decision may be based.

Indiscriminate dumping of information request responses into the record without examination is not consistent with a rule that proscribes "unduly repetitious or cumulative" evidence and that encourages compliance with the evidentiary rules of court to the extent practicable.

Following an agreement reached in another case under different and unique circumstances will result in this case in tremendous distraction from the issues and evidence properly framed and presented by the parties in this case. It is also inconsistent with the procedural rules in 220 CMR 1.00 *et seq.* and the Ground Rules in this case.

II. THE ADMISSION OF OVER ONE THOUSAND INFORMATION RESPONSES WILL RESULT IN INCOMPLETE AND IRRELEVANT INFORMATION ENTERING THE RECORD.

Verizon's belated attempt to change the procedural framework for this case will only confuse the evidentiary record. It belatedly offers over 1,100 information requests, many of which have never been connected by any witness to any of the positions Verizon has taken in this case. These responses were prepared for the purposes of discovery – not for submission as evidence. Many of the responses are incomplete, in that they do not provide the Department with contextual information necessary to understand the significance of the answer. But if discovery responses are admitted into evidence now, even if their relevance was never established either through prefiled testimony or through cross-examination, no party will have an opportunity to assist the Department by demonstrating the ways in which those responses are irrelevant, incomplete, or otherwise flawed. As a result, the wholesale admission of these

responses will confuse the record, as clear positions taken within testimony will be blurred by incomplete and unexplained information within the information responses.

A. Unlike Evidence in the Pre-filed Testimony, The Majority of the Discovery Responses Have Not Been and Cannot Practically Be Tested through the Adjudicatory Process.

"The standard for determining whether a document [or information] is discoverable is much broader than the standard for admission into evidence." D.T.E. 01-20, *Interlocutory Order* dated October 18, 2001, at 32, n.24. Thus, the mere fact that information was requested and produced is not an indication that the answers are admissible, or indeed even relevant to the issues in this case. This is particularly the case when a party may have produced responses that were not responsive to the question asked. Over-broad, non-responsive and irrelevant responses to pre-trial discovery only become a problem if such discovery responses automatically become a part of the record in the absence of an objection. Should the Department grant Verizon's Motion, it will inevitably result in the admission of many irrelevant and incomplete responses into the record.

It is unfair and unreasonable to put the burden on non-moving parties to address and perhaps challenge over 1,100 discovery answers at this late date. Even Verizon's own witnesses cannot keep track of Verizon's many discovery responses. "Quite frankly, you lose track when there are so many interrogatories." Nancy Matt, Tr. at 2326 (Jan. 31, 2002).

The reason why the procedural framework for this case contemplates that discovery responses will not automatically come into evidence, but instead provides opportunity for witnesses through pre-filed testimony or answers on cross-examination to lay a proper foundation for the admission of a discovery response into evidence, is in part because it would not be humanly possible for parties to respond to all discovery answers in the case. The issues are significantly numerous and complex that it has been a tremendous challenge just to

understand and respond to Verizon's testimony and cost models. Verizon's motion to admit all discovery responses is an effort, at the very end of the case, to magnify that burden to inhuman proportions by creating a retroactive burden to rebut any and all discovery responses.

Verizon's Motion is an attempt to supplement this proceeding's evidentiary record with a host of frequently irrelevant and incomplete discovery responses. The admission of every one of these responses would create a skewed record as the parties would not be afforded with any practical opportunity to expand upon or explain the context of certain information responses that were previously considered in the nature of discovery. The parties to this proceeding have produced a prodigious amount of information requests, numbering over 1,100. The indiscriminate admission of all such requests would result in an evidentiary record checkered with irrelevant and incomplete information. Furthermore, the admission of every response would create the potential for prejudice due to each party's practical inability to provide further explanation and context for every response.

In short, admission of all discovery responses into evidence is a bad idea that would both be unfair to the other parties and would make the Department's job in this case substantially harder than it already is.

B. Verizon Should Not Be Allowed To Add Evidence At This Late Date, Neither By the Pending Motion Nor by Reopening the Hearings For Additional Testimony.

Verizon has threatened that if its motion to admit all discovery responses into evidence is denied, that it "may be asking to reopen the record." Tr. 783, 1/18/02 (Werlin). Reopening the hearings so that Verizon may, after the fact, attempt to connect additional discovery responses to live issues in this proceeding would be no more proper than its pending motion. Indeed, it would change the rules after the fact simply because Verizon did not follow the rules in the first place.

Verizon has had full opportunity to make use of discovery responses in its pre-filed testimony. As explained above, it has taken advantage of that proposal throughout its testimony. There is and would be no basis for permitting Verizon to offer evidence after the hearings that it failed to include in any of its rounds of prefiled testimony.

Conclusion.

For the reasons stated above, AT&T respectfully urges the Department to deny Verizon's Motion to Establish Procedures for the Identification and Entry of Evidence, and not to permit Verizon to introduce into evidence many hundreds of discovery responses the relevance of which was never established either through pre-filed testimony or through testimony elicited on cross-examination. AT&T also respectfully urges the Department not to permit Verizon to use its belated filing of an improperly broad-ranging motion to delay the briefing schedule or otherwise disrupt the prompt resolution of this case.

Respectfully submitted,

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